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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA
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7 GRACE ALBANESE,

8 Plaintiff,

9 vs.

10 LAS VEGAS METROPOLITAN POLICE
11 DEPARTMENT and DOUG GILLESPIE,

12 Defendant.

Case No. 2:16-cv-00532-RFB-GWF

**ORDER AND REPORT
AND RECOMMENDATION**

13 This matter comes before the Court on the screening of Plaintiff's Amended Complaint
14 (ECF No. 17), filed on October 17, 2016. The Court granted Plaintiff *in forma pauperis* status on
15 October 3, 2016. *See* (ECF No. 13).

16 **BACKGROUND AND DISCUSSION**

17 **I. Screening the Complaint**

18 Upon granting a request to proceed *in forma pauperis*, a court must additionally screen a
19 complaint pursuant to 28 U.S.C. § 1915(e). Specifically, federal courts are given the authority to
20 dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which
21 relief may be granted, or seeks monetary relief from a defendant/third party plaintiff who is
22 immune from such relief. 28 U.S.C. § 1915(e)(2). A complaint, or portion thereof, should be
23 dismissed for failure to state a claim upon which relief may be granted "if it appears beyond a
24 doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to
25 relief." *Buckey v. Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). A complaint may be dismissed
26 as frivolous if it is premised on a nonexistent legal interest or delusional factual scenario. *Neitzke*
27 *v. Williams*, 490 U.S. 319, 327–28 (1989). Moreover, "a finding of factual frivolousness is
28 appropriate when the facts alleged rise to the level of the irrational or the wholly incredible,

whether or not there are judicially noticeable facts available to contradict them.” *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). When a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

The Court shall liberally construe a complaint by a pro se litigant. *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 2007). This is especially important for civil rights complaints. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, a liberal construction may not be used to supply an essential element of the claim absent from the complaint. *Bruns v. Nat’l Credit Union Admin.*, 12 F.3d 1251, 1257 (9th Cir. 1997) (quoting *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982)).

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint for failure to state a claim upon which relief can be granted. Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). A properly pled complaint must provide a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although Rule 8 does not require detailed factual allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The court must accept as true all well-pled factual allegations contained in the complaint, but the same requirement does not apply to legal conclusions. *Iqbal*, 129 S.Ct. at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory allegations, do not suffice. *Id.* at 1949. Secondly, where the claims in the complaint have not crossed the line from plausible to conceivable, the complaint should be dismissed. *Twombly*, 550 U.S. at 570.

II. Instant Complaint

The Court originally dismissed Plaintiff’s one-page complaint because it provided the Court with no factual basis for her claims. *See Order* (ECF No. 13). Plaintiff filed an amended

1 complaint pursuant to 42 U.S.C. § 1983 against the Las Vegas Metropolitan Police Department
2 (“LVMPD”) and Doug Gillespie, in his official capacity, alleging that her Fourth, Fifth, Ninth and
3 Fourteenth Amendment rights were violated. Plaintiff asserts that Defendant Gillespie caved into
4 pressure by Homeland Security who was working with members of LVMPD to remove Plaintiff
5 from Las Vegas. Officers from LVMPD allegedly stalked Plaintiff and wire-tapped her telephone.
6 Plaintiff requests damages from Defendants for their “utter lack of regard [of] my rights and the
7 rights of my daughter who suffered as well.” *Amended Complaint* (ECF No. 17), pg. 5.

8 **A. Municipal Entity Liability Under § 1983 - *Monell* Claim**

9 Section 1983 suits against local governments alleging constitutional rights violations by
10 government officials cannot rely solely on respondeat superior liability. *See Whitaker v. Garcetti*,
11 486 F.3d 572, 581 (9th Cir. 2007); *see also Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691
12 (1978). A plaintiff can bring a § 1983 action against a local government entity if the plaintiff can
13 show that the entity had an established policy or custom that caused employees who implemented
14 the policy or custom to violate the constitutional rights of others. *Monell*, 436 U.S. at 690–92; *see*
15 *also, Van Ort v. Estate of Stanewich*, 92 F. 3d 831 (9th Cir. 1996). However, absent such a policy
16 or custom, a local government entity cannot be held liable solely because one of its employees
17 commits an unlawful wrong against another. *Id.* at 691. Here, from what the Court can ascertain,
18 Plaintiff asserts that LVMPD violated her rights because they stalked her on numerous occasions.
19 The rest of Plaintiff’s amended complaint does not make sense and fails to state specific dates on
20 which the alleged constitutional violations took place. Moreover, Plaintiff does not demonstrate
21 that LVMPD’s conduct was driven by a policy or custom implemented by LVMPD and that the
22 policy or custom was the driving force behind the alleged violations of Plaintiff’s constitutional
23 rights. Therefore, the Court will dismiss the § 1983 claim against LVMPD without prejudice, and
24 will give Plaintiff leave to amend her amended complaint to state sufficient facts to state a claim, if
25 he is able to do so.

26 **B. Municipal Employee Liability Under § 1983**

27 State officials sued in their official capacity for damages are not persons for purposes of §
28 1983. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 n. 24 (1997). Official-suits

1 filed against state officials are merely an alternative way of pleading an action against the entity of
2 which the defendant is an officer. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). Therefore, in an
3 official-capacity suit, the plaintiff must demonstrate that a policy or custom of the governmental
4 entity of which the official is an agent was the moving force behind the violation. *Id.*; *See also*
5 *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690–92 (1978). Defendant Doug
6 Gillespie was a state official at the times discussed in Plaintiff's complaint and he is therefore not a
7 person for § 1983 purposes. As a result, the Court will recommend that Plaintiff's claims against
8 Defendant Gillespie be dismissed with prejudice.

9 If Plaintiff elects to proceed in this action by filing an amended complaint, she is informed
10 that the court cannot refer to a prior pleading in order to make her amended complaint complete.
11 Local Rule 15–1 requires that an amended complaint be complete in itself without reference to any
12 prior pleading. This is because, as a general rule, an amended complaint supersedes the original
13 complaint. *See Valdez-Lopez v. Chertoff*, 656 F.3d 851, 857 (9th Cir. 2011); *see Loux v. Rhay*, 375
14 F.2d 55, 57 (9th Cir.1967). Once Plaintiff files an amended complaint, the original pleading no
15 longer serves any function in the case. Therefore, in an amended complaint, as in an original
16 complaint, each claim and the involvement of each defendant must be sufficiently alleged. Plaintiff
17 is advised that litigation will not commence upon the filing of an amended complaint. Rather, the
18 Court will conduct an additional screening of the amended complaint pursuant to 28 U.S.C. §
19 1915(e). If Plaintiff fails to file an amended complaint or fails to cure the deficiencies identified
20 above, the Court will recommend that the complaint be dismissed with prejudice. Accordingly,

21 **IT IS HEREBY ORDERED** that Plaintiff's Complaint (ECF No. 17) be **dismissed**
22 without prejudice with leave to amend. Plaintiff shall have until **November 2, 2017** to file an
23 amended complaint correcting the noted deficiencies.

24 **RECOMMENDATION**

25 **IT IS HEREBY RECOMMENDED** that Plaintiff's claims against Defendant Doug
26 Gillespie be dismissed with prejudice for failure to state a claim upon which relief may be granted.

27 **NOTICE**

28 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be

1 in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has
2 held that the courts of appeal may determine that an appeal has been waived due to the failure to
3 file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit
4 has also held that (1) failure to file objections within the specified time and (2) failure to properly
5 address and brief the objectionable issues waives the right to appeal the District Court's order
6 and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153,
7 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

8 DATED this 2nd day of October, 2017.

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11 GEORGE FOLEY, JR.
12 United States Magistrate Judge
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